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DISTRICT IV

April 6, 2023

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Circuit Court Judge
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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1333-CR State of Wisconsin v. Chad A. Jeche (L.C. # 2018CF146)

Before Blanchard, P.J., Kloppenburg, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Chad Jeche appeals a judgment of conviction and an order denying his postconviction motion without an evidentiary hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Jeche was convicted, following a jury trial, of delivery of amphetamine. The State's case against Jeche was based on a controlled buy involving a confidential informant, D.J. Jeche filed a postconviction motion arguing that his trial counsel provided ineffective assistance when counsel: (1) failed to request a specific instruction on assessing the credibility of a confidential informant; and (2) failed to cross-examine the informant as to his arrest, nine months after the controlled buy, for possessing methamphetamine. The circuit court denied the postconviction motion without an evidentiary hearing.

If a postconviction motion alleges sufficient facts that, if true, would entitle the defendant to relief, the circuit court must hold an evidentiary hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. On a claim of ineffective assistance of counsel, the postconviction motion must sufficiently allege both deficient performance and prejudice. ***Id.***, ¶26. Counsel's performance is deficient if counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense if, absent the errors, there is a reasonable probability of a different result. ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984). We review de novo whether a postconviction motion alleged sufficient facts to require the circuit court to hold an evidentiary hearing. ***Allen***, 274 Wis. 2d 568, ¶9. The circuit court "has the discretion to grant or deny an evidentiary hearing even when the postconviction motion is legally insufficient." ***Id.***, ¶12.

Jeche argues that his postconviction motion alleged sufficient facts to entitle him to an evidentiary hearing on his claims of ineffective assistance of counsel. We conclude that the facts alleged in the postconviction motion, if true, fail to establish ineffective assistance of his trial counsel. Accordingly, Jeche is not entitled to an evidentiary hearing on his motion.

First, Jeche contends that his trial counsel was ineffective in failing to request an instruction on assessing an informant's credibility. Jeche acknowledges that the Wisconsin standard jury instructions do not include an instruction on assessing an informant's credibility, but cites the following "informant instruction" from a federal circuit court of appeal:

> The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant.

See ***United States v. Luck***, 611 F.3d 183, 186-90 (4th Cir. 2010) (quoted source omitted) (noting "consensus" among federal circuit courts of appeal "that an informant instruction is necessary when the informant's testimony is uncorroborated by other evidence"). Jeche contends that such an instruction would have been appropriate here, citing the broad proposition that cautionary instructions are "normally an important part of the due process safeguards to which a defendant is entitled." *See* ***State v. Miller***, 231 Wis. 2d 447, 466, 605 N.W.2d 567 (Ct. App. 1999) (addressing potential immunized witness jury instruction). He contends that the general witness credibility instruction that the circuit court gave the jury was insufficient because it did not specifically caution the jury to weigh the informant's testimony with greater care than the testimony of a non-informant witness.

We conclude that trial counsel's performance was not deficient in failing to request a specific informant instruction in addition to the general witness credibility instruction that was given at trial. First, as Jeche concedes, the Wisconsin standard jury instructions do not include an informant instruction, and Jeche cites no Wisconsin case indicating that an informant instruction was required. We are not persuaded that counsel performed deficiently by failing to

request an instruction not included in the Wisconsin standard jury instructions and not required by any Wisconsin case. *See* ***State v. Hanson***, 2019 WI 63, ¶28, 387 Wis. 2d 233, 928 N.W.2d 607 ("In order to constitute deficient performance, the law must be settled in the area in which trial counsel was allegedly ineffective.").

Moreover, the federal appellate court opinion on which Jeche relies states that the informant instruction is required only "when the informant's testimony is uncorroborated by other evidence" such that "a reasonable lawyer would have been concerned that the uncorroborated testimony of paid informants could have been manufactured out of whole cloth for the benefit of the informant alone." ***Luck***, 611 F.3d at 187-88 (explaining that, "while [the informant] was equipped with recording equipment for her buys, the quality of the recordings was so poor that they were not even used at trial"; and that, while law enforcement "somewhat corroborated her testimony by observing that she came back from the buys with cocaine base, [the officer] also admitted that he did not conduct a thorough search before [the informant] interacted with Luck").

Jeche points out that, here, there was no other witness testimony to corroborate the drug transaction between D.J. and Jeche. However, as the State points out, there was law enforcement testimony that D.J. and his vehicle were thoroughly searched before the controlled buy and that his actions were monitored until he returned with the methamphetamine and turned it over to law enforcement. Police further testified that they provided D.J. with money, and that he then entered Jeche's garage, spoke with Jeche, and immediately afterward met with police and provided to them a substance that tested positive for methamphetamine. A recording of D.J. speaking with Jeche in the garage was played for the jury. Accordingly, Jeche has failed to show that his counsel's performance was deficient when counsel did not request an informant

instruction. Therefore we need not address the prejudice prong. *See* ***State v. Maday***, 2017 WI 28, ¶54, 374 Wis. 2d 164, 892 N.W.2d 611.

Separately, Jeche contends that his trial counsel was ineffective by failing to cross-examine D.J. as to his arrest for possessing methamphetamine nine months after the controlled buy. We reject this argument based on a lack of showing of prejudice.

Prior to trial, the circuit court ruled that the defense could not cross-examine D.J. about his arrest for possessing methamphetamine nine months after the controlled buy on the ground that D.J.'s subsequent arrest occurred such an extended period after the controlled buy. Jeche argues that trial counsel was ineffective in failing to pursue this issue after D.J. testified at trial that he purchased methamphetamine from Jeche before the controlled buy, which Jeche contends was inadmissible evidence that opened the door to cross-examination regarding D.J.'s subsequent possession under the curative admissibility doctrine. *See* ***Bertrang v. State***, 50 Wis. 2d 702, 706, 184 N.W.2d 867 (1971) ("The purpose of [the curative admissibility] rule is to 'cure' some prejudice resulting to a party as the result of the presentation by the opposing party of evidence which is inadmissible."). Jeche argues that the cross-examination was necessary to support the defense that D.J. was not a reliable witness, by showing that D.J. breached an agreement that D.J. had entered into with law enforcement as part of his informant work, under which D.J. would not possess any controlled substances. Jeche argues that D.J. was already not a credible witness and that, with a more robust attack on his credibility, there is a reasonable probability of a different outcome.

However, as explained above, the State's evidence included testimony by law enforcement that they thoroughly searched D.J. and his vehicle before the controlled buy, and

that D.J. was then monitored while he went into Jeche's garage, spoke with Jeche, and immediately met with law enforcement and turned over methamphetamine. As the State points out, that was strong evidence that Jeche provided the methamphetamine to D.J. at the time of the controlled buy, and the prosecution's theory of the case at trial did not depend on D.J.'s reliability given the degree of control that police exercised over the alleged drug transaction.

Accordingly, trial counsel's failure to cross-examine D.J. as to his arrest nine months after the controlled buy does not undermine our confidence in the outcome of the trial. *See* ***State v. Sholar***, 2018 WI 53, ¶33, 381 Wis. 2d 560, 912 N.W.2d 89. Because Jeche failed to show prejudice on this claim of ineffective assistance of counsel, we need not reach the issue of whether counsel's performance was deficient. *See* ***Maday***, 374 Wis. 2d 164, ¶54.

Finally, Jeche argues that, even if the facts alleged in his postconviction motion were insufficient to require an evidentiary hearing, the circuit court nonetheless erroneously exercised its discretion by failing to hold one. He contends that the circuit court should have granted an evidentiary hearing to complete the record on questions concerning D.J.'s credibility. We are not persuaded that the circuit court erroneously exercised its discretion by denying the motion without an evidentiary hearing. *See* ***State v. Ruffin***, 2022 WI 34, ¶35, 401 Wis. 2d 619, 974 N.W.2d 432 (if a postconviction motion "does not raise facts sufficient to entitle the defendant to relief, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing"). As Jeche acknowledges, D.J.'s credibility was already called into question at trial. The defense was allowed to elicit from D.J that he had four open criminal cases, including a charge for possession of methamphetamine and multiple charges for delivery of methamphetamine. Further, as we have noted, his reliability was not pivotal to the prosecution's

theory at trial. The circuit court provided a reasonable explanation that it denied the postconviction motion without a hearing because Jeche's allegations, if true, did not establish ineffective assistance of counsel, and did not raise any issues of fact that needed to be resolved.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals